No. 4685.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Maryland Casualty Company, a Corporation,

Plaintiff in Error,

vs.

The Citizens National Bank of Los Angeles, a Banking Corporation,

Defendant in Error.

ANSWER TO PETITION FOR REHEARING.

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Plaintiff in error in its petition for rehearing complains that this court "did not decide or pass upon the questions of law on the special findings of fact as presented and raised by subdivision 4, at page 76 of the brief of plaintiff in error". (Pet. for Rehearing, p. 4.)

In its opinion, after declaring that the bill of exceptions had been signed and certified in contravention of law, this court declared:

> "The bill of exceptions must therefore be disregarded, and this leaves for consideration only the sufficiency of the complaint, and the sufficiency of the special findings to support the judgment."

The closing paragraph of the opinion reads:

> "In the face of these findings it cannot be seriously contended that the fraud of the secretary did not result in substantial loss to the Cotton Company. The complaint and findings amply support the judgment and the judgment is accordingly affirmed."

Accordingly, it appears: first, that this court considered that "the sufficiency of the special findings to support the judgment" was one of the questions before it for decision; second, that "the findings amply supported the judgment". Nothing further was required.

> National Prohibition Cases, 253 U. S. 350, at 384;
>
> Texas & Pacific Ry. Co. v. Hill, 237 U. S. 208, at 215.;

In states where there is a constitutional provision relating to the matter the courts are not required to assign reasons for every point decided.

> People v. Burke, 18 Cal. App. 72, at 78.
>
> "Indeed, it seems hardly practicable or requisite to notice specifically all of the grounds of attack upon the judgment to which our attention has been invited. The author of an opinion should, of course, keep in mind the constitutional provision requiring an appellate court to give reasons

for its conclusion, and should have a due regard for the gravity of the offense and the possible bearing of the opinion as a precedent in the future. He should also be not unmindful of the valuable assistance of counsel, but, manifestly, he must follow his own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and as to the questions which are worthy of notice at all."

Garrett v. Weinberg, 59 S. C. 162; 37 S. E. 51, at 61.

"For this court to undertake to formulate the exceptions, subdivisions, and branches of subdivisions so as to state distinctly the points which the appellants claim arise upon the record of the case, would impose upon the court a duty not contemplated by the constitution, especially as the supreme court is required to file its decisions within 60 days from the last day of court at which the cases were heard. While this court has considered the exceptions, and decides that they cannot be sustained, it has not, on account of the facts just mentioned, stated its reasons in reaching said conclusion."

In its opinion the court, after pointing out that the sufficiency of the complaint and of the special findings to support the judgment were the only questions to be considered, declared:

"While these questions are raised by the assignments of errors unfortunately the assignments are discussed in the brief in connection with other assignments which depend upon the bill of ex-

ceptions and we are left somewhat in the dark as to the particular objections urged against the complaint and findings alone."

To none of the many contentions urged by plaintiff in error is this declaration of the court more pertinent than to the contention made under subdivision 4, page 76 of the brief of plaintiff in error. Turning to page 76 of the brief of plaintiff in error we find that from assignments of error numbers 2, 25, 27, 28 and 30, the contention made under subdivision 4 is evolved. Turning to pages 35 to 47 of the brief of plaintiff in error, we find:

"1. Assignment number 2 specifies as error the action of the trial court in denying defendant's motion for nonsuit."

A consideration of this assignment involves an examination of the evidence.

"2. Assignments numbers 25 and 30 specify the insufficiency of the evidence to support the finding that the stock sale from West to Sears occurred on December 1, 1920."

A consideration of these assignments involves an examination of the evidence.

"3. Assignment number 28 specifies that the judgment is 'contrary to law and to the cause made and facts stated in the pleading and records in said action'."

The phrase "the cause made" refers to the evidence introduced.

The declaration of the trial court [Tr. pp. 150-151] *"that for all practical purposes"* on and after December 1, 1920, the Cotton Company acted as a corporation sole, to wit: J. B. Sears, is not, as counsel for plaintiff in error contends, a finding of fact, but is the conclusion of the court from the findings of fact immediately preceding the statement of such conclusion. [Tr. p. 149.] Because of its conclusion that on December 1, 1920, Sears for all practical purposes became the corporation, the trial court, applying the principle laid down in the decisions cited by counsel for plaintiff in error in their brief, pages 81 to 95, inclusive, released the Surety Company from further liability upon the bond, although the evidence disclosed that subsequent to that date Sears continued his practices of fraud and deception to the great financial loss of the Cotton Company.

The principle announced and applied by the courts in the decisions cited by plaintiff in error is, to it, most favorably stated by plaintiff in error (Brief, p. 91) as follows:

"When a person whose conduct is insured ceases to be an employee within any fair and reasonable interpretation of the term used in the policy, the insurer's liability *should cease,* unless he has notice of the change."

This principle was applied by the trial court in releasing the plaintiff in error from further liability after December 1, 1920, at the time when, as the court concluded, Sears, the person whose conduct was in-

sured, ceased to be an employee and for all practical purposes became the corporation or employer.

Counsel for plaintiff in error, not satisfied with the application of the rule as contended for by it in the trial court and there applied to the facts found, now seeks for the first time before the appellate tribunal to have the principle ("when the employee becomes employer the insurer's liability should cease") added to and supplemented by the further proposition "and all existing liability shall be extinguished".

In other words, plaintiff in error seeks to have the principle given a retroactive effect so as to read "when the person whose conduct is insured ceases to be an employee within any fair and reasonable interpretation of the term used in the policy, the insured's liability shall cease, *and any existing liability of the insurer shall be extinguished.*"

A more pointed expression of the principle contended for by plaintiff in error is stated as follows:

"When the person whose conduct is insured ceases to be an employe within any fair and reasonable interpretation of the term used in the policy, the policy shall thereupon become cancelled *as of the date of its issuance,* unless the insurer elect to the contrary."

No authorities have been cited which sustain this contention of plaintiff in error.

The case cited by plaintiff in error (Farmers & Merchants State Bank v. U. S. Fidelity & Guaranty Company, 28 S. D. 315, 36 L. R. A. (N. S.) 1152) involving the acquisition by the risk of "ownership of a majority of the stock and control and management of an insured corporation", goes no further than to hold that the insurer is not liable for delinquencies of

the risk committed *after* such change in ownership and control. There is no intimation in that case that such a change has the effect of *releasing* the insurer from liabilities incurred *prior* to such change.

In the more recent case of Bank of Willow Lakes v. Syverson, 43 S. D. 295, 178 N. W. 989, the same court repudiated the doctrine, announced in the case of Farmers & Merchants State Bank etc. v. U. S. Fidelity & Guaranty Company, that change of ownership of stock exempted the insurer from liability for fraudulent acts on the part of the risk "committed after he had acquired control of the corporation", saying among other things:

> "Must we not assume that the company did not consider possible changes of stock ownership as affecting the hazard involved, even though the same men whose integrity was guaranteed, and who constituted a majority of the stockholders, should choose to place themselves in active management and control of the affairs of the bank? May we not assume that the bonding company considered the hazard lessened rather than increased, when persons holding a majority of the stock, and therefore most heavily interested in the success or failure of the business should themselves choose to assume direct control and management of the affairs of the bank? Neither the application nor the policy in this case contains any warranties, express or implied, nor any representations, from which an inference of increased hazard may be drawn in case the employes whose integrity is guaranteed should become majority stockholders, and thereby invested with absolute and plenary management, control, and supervision of the affairs of the bank. *The application and policy constitute the entire contract between the bank and the company, and the courts are without*

power to interpolate into it conditions wholly foreign to its express or implied provisions. For this reason we are of the view that the case of Farmers & Merchants Bank v. U. S. Fidelity & Guaranty Co. should not be followed. This view renders it unnecessary to consider a number of collateral propositions urged by appellant's counsel, chief of which is that the defendant company would not have issued a policy, had it been advised that Syverson and Flindt had become the owners of a majority of the stock."

Notwithstanding this later decision, the learned judge of the trial court, as pointed out in the brief of defendants in error (page 96), applied the doctrine of the earlier South Dakota case and limited the recovery to the liability incurred before Sears purchased the stock of West. In our brief, pages 91 to 101, our position respecting this contention is more fully set forth.

The opinion of this court, as pointed out in the opening paragraphs of this answer, is a complete response to the petition for rehearing.

Because of our contentions as herein expressed and the absence of court rule providing for the filing of an answer to a petition for rehearing, we ask, in addition to the denial of the petition for rehearing, the indulgence of the court in the matter of this answer.

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